IN THE LABOUR COURT OF SOUTH AFRICA (HELD AT JOHANNESBURG)		
		CASE NO: J 2247-2010
In the matter between		
VOLSCHENK, B		**1st Applicant**
VAN DER WESTHUIZEN, E. F		**2nd Applicant**
and		
MORERO, SELLO DADA *N.O.*		**1st Respondent**
THE CITY OF JOHANNESBURG		**2nd Respondent**
CITY POWER JOHANNESBURG (PTY) LTD		**3rd Respondent**
JUDGMENT		

LAGRANGE, J

Background

1. This matter was heard on an urgent basis. It was opposed by the second respondent, the City of Johannesburg. My brief reasons for the order are set out below.

2. The two applicants are seeking an interdict staying disciplinary proceedings pending a review of a ruling of a chairperson of the disciplinary enquiry denying them legal representation in the form of an attorney and, or alternatively, an advocate.

3. It is common cause that a chairperson of an enquiry must consider such a request notwithstanding the provisions of the disciplinary code, which do not provide for legal representation. All this means is that he must exercise his discretion on the issue when it is raised. The essential requirement by which the need to permit legal representation is evaluated is whether fairness necessitates it.[1]

4. In terms of the disciplinary code and procedures which are applicable to the proceedings, the employees are entitled to be represented by trade union representatives, who are not confined to shop stewards but include union officials, who might be full-time paid employees of a union. They declare they have no confidence in union representation without attempting to justify this subjective belief with reference to objective factors. The employer is represented in the enquiry by an admitted and practising attorney.

Existence of a *prima facie* right

5. The applicants believe that the circumstances of the enquiry are such that the chairperson ought to have exercised his discretion to permit legal representation in their favour. In support of this they cite the following reasons:

    5.1. The employer is making use of a legal professional and there would not be 'parity of arms' if they could not engage such expertise in their own defence.

    5.2. They believe the matter is complex. In this regard they cite the fact that they are facing a charge of fraudulently misrepresenting City Power by writing off several accounts without the required supporting documentation and/or authority causing City Power a financial loss in the region of R 6 million. Alternatively, they were accused of causing

1 See ***Majola v MEC, Department of Public Works, Northern Province & others*** **[2004] 1 BLLR 54 (LC)** at 54, [1] and, more recently, ***MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani*** **(2004) 25 *ILJ* 2311 (SCA) at** 2315,[11]

such loss by being negligent or dilatory in their duties in writing off the accounts without the necessary authorizations. Apart from the value of the alleged loss they point out that transactions in question involve 93 separate transactions.

5.3. They were initially charged criminally and though these charges were later withdrawn without explanation, they could be reinstituted.

5.4. There was a suggestion that the case might entail evidence by accounting experts and they would be disadvantaged in dealing with such expert evidence.

6. In evaluating these reasons I am compelled to look only at the merits of the applicants' claims as they appear on the affidavits, because I do not have the reasons why they were refused legal representation before me.

7. On the question of the complexity of the matter, it appears that although there may be many instances of impugned transactions, the essential question in each case is whether amounts were written off without the necessary authority or supporting documentation. The applicants have been employed for several years in the billing department of the respondent. On the face of it, the factual basis of the allegations is one that they ought to be able to deal with on the basis of their working knowledge of the billing procedures. If the employer deluges them with significant amounts of documentary evidence in the course of the enquiry, which they need to peruse and consider, that is something that can be dealt with by way of requests for postponement and, or alternatively timeous discovery of the documents in question, if justified.

8. At this stage, there is no indication that a forensic expert will be used. Should that occur, the applicants might wish to call a similar expert to assist them. There is no reason why the question of legal representation might not be revisited if that occurs, but there is insufficient evidence before me now to assume that such witnesses will testify, or that they will be unable to deal with the evidence of such witnesses based on their own knowledge of the billing

system. Judging by the applicants' own account of their interaction with the employer's internal investigator, Mr Mkhonza, they were able to deal with the allegations against them, even to the extent that they explained to him how the billing system worked.

9. The fact that the cumulative effect of the charges involves a large amount is not in itself a factor which demonstrates that legal counsel is required. The most serious prejudice the applicant's face in consequence of the outcome of enquiry is dismissal, not a civil judgment debt. This is the same prejudice facing employees implicated in dishonest conduct involving even small amounts of money.

10. On the question of the whether legal expertise is required to deal with questions of fraud and the like, such charges against employees are commonplace and in my view is also not an issue necessitating legal expertise to address it. In so far as the charges might involve evaluating the intent of the employees, that is matters within the knowledge of the employees and on which they should be able to give evidence without difficulty and be able to defend themselves.

11. Criminal and disciplinary proceedings are distinct and the result of one may not be relied on in the other proceedings. To the extent that the applicants may not wish to make any incriminating statements they may exercise their right not to give evidence (See, ***Fourie v Amatola Board*** **(2001) 22 *ILJ* 694 (LC)** at 696**-7,** [7] –[11]). It is not uncommon for employees facing charges involving loss or damage to an employer's property to also face actual or potential criminal charges.

12. On the question of 'parity of arms' raised by the applicants, it must first be noted that in having the right to representation by a full time union official, the applicant's rights to representation are more extensive than those provided for in the LRA, which do not go beyond the right to representation by a union shop steward.[2] There is no restriction on the expertise that such a union official may possess. The main authorities on the question of legal representation in internal enquiries do not dictate that there must be parity between the ability

2 See Labour Relations Act, 66 of 1995, Schedule 8, Code of Good Practice: Dismissal, Item 4(1)

and expertise of representatives, but only that the procedure should be fair.[3] Whether that might necessitate legal representation will depend on the particular factual circumstances which demonstrate that an exception to the rule is justified. In the circumstances of this matter, I do not believe the applicants would be deprived of a fair hearing if they were only able to use a union official as their representative.

13. Accordingly, I am not satisfied that the applicants have laid sufficient facts before the court to conclude that this is a case in which they have a *prima facie* right to be allowed legal representation on a proper exercise of the presiding officer's discretion.

Threat of irreparable harm

14. I am also not persuaded on the evidence available that the applicants will suffer irreparable harm in the conduct of their case if they cannot be represented by a legal representative as opposed to a trade union official, given the apparent factual substratum of the charges and the level of skill an average union official might ordinarily be expected to display in defending members in an enquiry.

Balance of Convenience

3 ***Hamata & Another v Chairperson, Penninsular Technikon Internal Disciplinary Committee & Others*** **(2002) 23 *ILJ* 1531 (SCA)** at 1536,[11] and 1539, [23] on the application of the principle in the context of administrative tribunals and applied in the context of disciplinary enquiries in ***MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani*** **(2004) 25 *ILJ* 2311 (SCA)** at 2315,[11]

15. The prejudice to the respondent of the enquiry being delayed, for what is likely to be a considerable period of time pending the outcome of a review, compared to the prejudice to the applicants in the event they are vindicated on review but denied interim relief, is much greater in my view, not least because it will have to continue paying the applicants' salaries while the enquiry is stalled, whereas the ramifications for the applicants if the ruling is set aside might be far reaching. Accordingly, the balance of convenience favours the respondent.

16. In the circumstances, the applicants have not made out a case for interim relief which would justify the court interfering in incomplete internal proceedings.[4]

Order

17. In the circumstances, the application for interim relief suspending the enquiry pending the outcome of a review of the chairperson's ruling refusing legal representation is refused.

18. No order is made as to costs

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of Hearing: 08 November 2010
Date of Judgment: 10 November 2010

Appearances

4 See ***Booysen v Minister of Safety and Security and Others*** (**CA 09/08, dated 01/10/2010**) unreported LAC judgment, at par [54].

For the Applicants: J F Steyn instructed by A C Nothnagel Attorneys

For the Respondent: V P Ngutshane instructed by Mdgajwa Attorneys